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WHY SHOULD LAW AND PHILOSOPHY GET TOGETHER?

JAMES H. TUFTS.

WHY should the lawyer and the philosopher get together? Why should it be supposed that former readers of the JOURNAL should be interested in principles of law, and why should lawyers be expected to read a Journal of Ethics?

It is quite possible that each class of readers may feel some repugnance to the mingling of the two subjects. The past readers of the JOURNAL, presumably more or less philosophical in tastes, may feel aggrieved when asked to master a new set of terms. They have become accustomed to the pure and practical reason of philosophy. Must they also master the legal rule of reason which seems to have difficulties for even the experts? Conversely lawyers for whom fictions have long been tame and gentle creatures and who never lose their way amid pleadings, rejoinders, and replications may find the vocabulary of intrinsic values strange and its distinctions curious.

But vocabularies can be mastered if it is worth while. When getting up a case the lawyer is not daunted though it demands technical terms of a new order. The ethical student ought not to shrink from the language in which the nation is governed. The vital question is whether there is so great a difference in purpose and methods as to make negligible for either side the value of mutual discussion. That there are many differences is obvious. One which is frequently cited is that law deals with what can properly be enforced upon others; ethics with what a man may set as his ideal or may prescribe to himself. This no doubt emerges sometimes when the social reformer seeks legislation or decisions which the lawyer disapproves or the courts refuse. Yet it is not, I think, the main barrier. For

laws, as well as the individual conscience, may set ideals which all good citizens will live up to without any thought of compulsion. Humane employers may be quite ready to adopt the principle of workmen's compensation or of protection against dangerous machinery when it is formulated, although their individual consciences might have failed through lack of knowledge or imagination to set so good a standard. A more serious difference may appear to exist in the attitudes of the law and of ethics toward the fundamental concepts.

The lawyer must make his conceptions of fair and unfair, of obligations and rights, as definite and as fixed as practicable. Even if for purposes of the statute, as for those of railway classifications, "pigs is pigs" while "rabbits is dogs," adjustment can be made to the phraseology if it is uniform, though zoölogists might prefer a differentiation.

On the other hand the philosopher is reluctant to commit himself to a fixed concept. It is not merely because he would find his occupation gone if he got his concepts all made. He has come to believe that the growing points of concepts are the most significant for him. In the extremely abstract sciences like mathematics one may continue to be one and a straight line a straight line, though even here the mathematician would find growth of meaning. But an atom is no longer an atom for the physicist and value for the economist is no longer as it was in the Middle Ages a stable quality which every article possesses independent of demand and supply. Still more is it the case in ethics that the growth of intelligence compels constant effort toward reconstruction in our ideas, and that the very business of the ethicist is to criticize his present stock. For to recur to the meaning of fair competition, the conscientious man has always tried to be fair but what was fair yesterday may be so unfair to-day that the thoughtful mind feels the need of a new conception of fairness. In Greece two principles of fairness had emerged—that of equality for all citizens, and that of inequality proportioned to birth or wealth or virtue or natural ability—and

these have in varying combinations maintained themselves till now. But they have not remained precisely the same. The equality of the eighteenth century, supposedly based on divine creation, was not just that of the Greek democracy based on free citizenship. The fairness of industrial or of national competition is not tested solely by the claims of what is due to wealth or to native ability, or to accident of position. The thought, likewise suggested in Greece, of regulation in the interest of an ideal social end hovers persistently in the background. And this ideal social end which shall include all the values on the one hand of evoking individual effort and on the other of making this effort helpful rather than destructive to others, we cannot as yet make clear because the end and means are so bound up together that they must be worked out step by step.

If then the work of the lawyer is to define fixed standards and that of the philosopher is to keep perpetually tinkering with his ideas it may seem that it is vain for either to learn from the other.

Yet even on this point the difference is not so absolute as the statements just made would indicate. In such a conception as that of the police power the Supreme Court of the United States has refused to make specific bounds. It pricks out lines on each side but leaves a considerable latitude within. It affirms that the law is a growing institution, not simply a bringing of cases under a fixed concept. Indeed every difficult decision almost inevitably leads a judge to rethink the meaning of the principles laid down in former decisions before he can say just how the new and marginal case is to be classed.

And on the other side it is equally evident that although the philosopher is vague, impatient of fixity and authority, this again is a question of emphasis. For the only basis for maintaining the *growth* of conceptions of fairness is a certain persistency of spirit and intention which enables us to use the same term without violence. The lawyer is more interested in bringing new cases under a principle laid down or a statute enacted. It may require a fiction; but if

so, a fiction is often forthcoming. The philosopher is more interested in pointing out the shift in meaning which is required in the principle if we make it cover the new case. He insists that it is nonsense to assume that all men are equal before the law when in fact they are not. He queries whether due process of law is reasonably limited to the ideas of the eighteenth century. He believes the best way to make progress is by continually emphasizing what he calls truth, rather than fiction, forgetting perhaps that on occasion philosophy has put forth such "noble fictions" as the equality of men, and the absolute value of humanity.

So far as this difference in method goes I conceive that it really offers a reason for co-operation. It is worth while for the philosopher to face the issue of what his maxims must mean if made a universal law. It is valuable for him to translate his principles into rules—provided he does it as the scientist tests his hypotheses. It compels him as nothing else can to recognize the interdependence between individual and public standards of morality. And while it is not my task to point out possible advantages for the lawyer I believe the need of securing flexibility and orderly growth is widely recognized among leaders in the profession.

Let me speak frankly on one aspect of the present situation in American education and life. If law has been criticized in recent days because at times it places technical consistency above real justice; if its individualistic principles are challenged as inadequate for present needs; if there is a feeling that the courts are not only judicial bodies but legislative bodies as well, and in this capacity less responsible to public sentiment than other legislative bodies; at least no one denies or questions that law is a power; that it is the agency, even if imperfect, through which society regulates trade, industry, and family life, protects persons and property, and adjusts in peaceful fashion one's disputes. Because it is a power it attracts men of ability. It offers not merely pecuniary return but participation in the large interests and directive forces of the day.

On the other hand, if ethics receives less criticism than law, is it certain that this is due to the superior character of ethics and philosophy? There is at least the possibility that ethics and philosophy are not criticised because, as was said of religion in England in the eighteenth century, they do no harm. At least it may be said that with some notable exceptions teachers of ethics have not exerted an influence upon the trend of events strong enough to challenge general attention. How far this is a professional and how far it is a personal matter might be hard to say. A personality like that of Fichte or Spencer will inevitably get a hearing. Conversely a profession which has dignity and influence will draw to itself great and ardent spirits. And of course it would be intolerable to speak as though ethical thinking and teaching were limited to professors or lecturers. Now, as in the days of Protagoras, all men are teachers of virtue and the authoritative voice is his who speaks for the enlightened and discerning conscience, whether on the bench, or the platform, from the pulpit or the chair, in the press or in the legislature. None the less the student and teacher of ethics ought fairly to covet his peculiar share of influence in the formation of public opinion and public policy. His specialization and that of law and the social sciences have taken from him the external occasions which made it natural for an Adam Smith or a Mill or a Sidgwick to speak to his generation in many fields. Fifty, or even twenty-five years ago, largely because it presented the great themes for which the student had been prepared by his religious training, the chair of philosophy exercised a commanding influence in college and university. It naturally appealed to strong men. To-day the educational shift to the social sciences, and the shift in public interest from religious to legal doctrines, have both tended to lessen the philosopher's power. Some of the profession have turned to logical problems, suggested by developments in the mathematical disciplines; others have been stimulated by the doctrine of evolution to metaphysical analysis. But it may be doubted whether either of

these would make a general appeal apart from the brilliant personalities and charm of style which have aided in their exposition. For many the moral interest in some form is supreme, and when the moral interest throughout the country centers on legal problems moral philosophy is abstract if it does not seek to understand these.

And this brings us to the great reason why the student of ethics who considers almost any concrete problem is forced into the legal field. He cannot settle or even comprehend his questions without going there. How academic to consider fairness without knowing what theory organized society is now proceeding upon! How futile to study the ethics of the family without asking whether the great forces of society and of industry as regulated or exempted from regulation by society, are changing the structure which former ethical theory has presupposed. The scientific attitude of the day no less than the changing social order compels one to study the moral consciousness as reflecting the whole organization of our society, and this means our laws as well as our prophets. Charity is a notable example. Help to the poor has always been regarded as a moral duty—as “benevolence” rather than “justice”. But with the present scientific temper it is as impossible simply to accept the intolerable load of poverty as a burden to be borne by a few benevolent persons, as it is to let the load lie where it falls. Such passive acceptance would often mean aiding injustice. We demand two things: First, a knowledge of the causes of poverty, second, a fairer distribution of such a proportion of the load as seems inevitable; and both of these carry us into law. For we cannot make a beginning in causes of poverty without encountering bad housing, unemployment, low wages, strikes, industrial accidents or occupational diseases, as well as the more individual causes,—such as intemperance or inadequate education. When now we seek to locate responsibility for these causes or ask what can be done, we encounter legal questions. Do we aim to correct bad housing? We are at once involved in the police power versus constitutional guaran-

ties of private property. We hear of the constructive measures which Europe takes for municipal housing, co-operative housing, and are told in certain states that such things are unconstitutional.

We turn to unemployment. Nothing is more obvious than that such unemployment as even before the European war oppressed multitudes is largely due to causes over which the individual workman had no control and for which no individual thrift could provide adequate remedy. The causes of business depressions may be regarded as still imperfectly understood, but the obvious method of distributing the incidence of the burden is by some form of insurance. This takes us into the field of legislation and is almost certain to raise constitutional questions just as workmen's compensation for accidents has already raised them in an acute form.

And when we come to other causes of poverty—low wages, industrial disease, meagre education, feeble-mindedness—we are at once in the legal field. Society is at present familiar with the doctrine that the state should provide and require education. The questions are those of degree. Regulation of wages for women and minors is just appearing above the horizon and has yet to be thoroughly discussed. Regulation of wages for men in privately managed industry has not been attempted in America. Yet it is evident that those who are in immediate contact with the difficulties of maintaining healthful and decent family life in cities on the wages for unskilled labor prevalent on a competitive basis are going to raise the question. Pressure from the criminal courts, from charitable organizations, from schools, from political students, is bound to increase until we find ways to deal more capably with our twenty percent more or less who now need help, and this will mean legal as well as moral constructive thinking.

A new spirit, born of a larger, more intelligent sympathy, and of a scientific method already victorious in the laboratory, is among us. Whereas we accepted poverty, crime, vice, class-conflicts, and many other evils as matters of

course, we now look for causes. And after causes come remedies. We are not frightened away even by the dogma that the cause for a given evil lies in human nature. For we are learning that human nature is partly an artificial product. Institutions make men as truly as men make institutions. The European War is at any rate deepening the conviction that it is time to think greatly, to undertake more seriously and with broader vision our task, to consider our institutions and our ideals in their interrelation.

All of us philosophers, social reformers, lawyers, statesmen have seen our problems too narrowly. We need to think in larger terms.

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